No. 14,724

IN THE

United States Court of Appeals

For the Ninth Circuit

HASKELL PLUMBING AND HEATING COMPANY, INC., a corporation authorized under the laws of the State of Washington and doing business in the Territory of Alaska,

Appellant,

vs.

JIMMY WEEKS, TOMMY JUDSON, MIKE CULLINANE, OLE FRANZ, ROY CALLAWAY, TOM MULCAHY, BEN HOLBROOK and JESSE HOBBS,

Appellees.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLEES.

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JURISDICTION.

The appellees concede that the District Court for the Third Division, Territory of Alaska, has jurisdiction in this proceedings by virtue of 48 USCA, Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The appellees also concede that the United States Court of Appeals for the Ninth Circuit has jurisdiction on appeal as stated by appellant.

THE FACTS.

Appellees believe that the following facts are more in accord with the evidence adduced at the trial of the case than the facts stated by the appellant in its brief.

The plaintiffs were plumbers who had been dispatched by their union to work for the defendant at King Salmon, Alaska. This station was 300 air miles from Anchorage in a wilderness area where the defendant had a contract to provide the plumbing and heating work on a construction project for the United States government.

The conditions under which the plaintiffs were to work had been made the subject of a written contract between the Plumbers Union and the defendant (R. 426) and amongst other terms and conditions there was a provision that the defendant would furnish room and board to the plaintiffs, paragraph 6 (a), plaintiffs' Exhibit No. 1 (R. 438).

The plaintiffs, upon arrival at the construction site, were taken by the defendant (R. 216) to a barracks building, in which each man was assigned a bed and a space to store his gear. This building was heated by two oil burning stoves and had washroom facilities as well as other conveniences (R. 153, 155).

On October 11, 1951, while the men were at work the building and its contents were destroyed by a fire caused by an explosion in one of the stoves.

The explosion resulted from defendant's negligence in permitting to be used a type of fuel oil for heating

purposes containing 10% gasoline, which gasoline had been added to the regular fuel oil by the "Bull Cook" (R. 259). The addition of gasoline in the quantity indicated created a fuel with a flash point so low as to make it dangerous to use in heating stoves (R. 248, 295, 296). This mixing of gasoline with fuel oil, plaintiffs accidentally discovered (R. 248), and subsequently reported to defendant's superintendent, pointing out to him the dangers incident to the practice and suggesting its discontinuance (R. 273). The superintendent admitted that it was not a safe practice and assured plaintiffs that the use of such fuel oil would be stopped (R. 273).

Nine plaintiffs lost personal property in the fire consisting of tools, clothing, luggage, rifles, watches, cameras, portable radios, electric razors, and other miscellaneous items in the aggregate value of $8,528.01, which loss was the basis for a complaint filed against the defendant (R. 3) in which the plaintiffs joined as parties under FRCP 20. The defendant attacked this joinder contending that the plaintiffs should have filed separate complaints, but the Court denied this motion, and the defendant then filed its answer (R. 18) generally denying the allegations of the complaint but failed to plead an affirmative defense. Shortly after the filing of the answer the defendant prepared and served upon plaintiffs nine separate sets of interrogatories to be answered. Each set consisted of between fifty and sixty general questions, most of which questions were not single inquiries but were multiple in form containing numer-

ous other inquiries from which for purposes of illustration we select two at random which are fairly typical of all:

> "48. Please state how many dress shirts you had burned in this fire, describe the dress shirts that were burned. Please state the name and address where you purchased said shirts, state the price you paid therefor, and state the length of time you had worn these shirts. Please state the design and color thereof." (R. 293.)
>
> "51. Please describe the two sweaters that you claim to have lost in the fire. Please give the name and address from whom you purchased each of the sweaters. Please give the price paid therefor. Please give the date or approximate date of the purchase thereof. Please state whether or not they were extensively used prior to the fire." (R. 65.)

Thus each set directed as it were to each of the nine original plaintiffs required each of them to answer literally hundreds of questions, pushing the liberal provisions of Rule 33 to limits not heretofore observed in any previous set of interrogatories. Plaintiffs excepted to the interrogatories on the grounds, among other things, that the questions represented a comprehensive inquiry into the entire case in the nature of cross-examination and were intended to harass the plaintiffs and discourage the prosecution of the suit, but at the time set for argument on these exceptions, when it appeared that the arguments might perhaps be more time-consuming than the trial of the case, the plaintiffs waived these exceptions, and

thereafter the interrogatories were answered by plaintiffs, served on defendant and filed in the case on April 2, 1954.

THE TRIAL.

The plaintiffs opened their case and introduced the contract of employment (R. 426) following which plaintiff Callaway testified in support of plaintiffs' case and established the fact that he was dispatched to work for defendant at King Salmon, Alaska, and that he was furnished quarters in the barracks building by the defendant (R. 153, 156). He described the fire (R. 154) and the loss of his personal property (R. 156 to 166). On cross-examination counsel for the defendant required Callaway to minutely describe the personal property he lost in the fire, such as socks, undershirts, shoes, and scores of other articles, demanding to know where and when the items were purchased, the price paid, the color of each, how long each item had been worn and other similar information in great detail (R. 166 to 210).

At this point the Court (R. 201), taking notice of the consequences in time consumption of pursuing the above described type of examination as to the property lost by the other plaintiffs, noted that each of the plaintiffs had fully answered similar questions put to them by the defendant in the interrogatories and suggested that the interrogatories and answers be offered in evidence on behalf of plaintiffs as to proof of the

property lost by plaintiffs and the value thereof. The interrogatories and the answers were then offered in evidence and the Court admitted them (R. 202, 208) but limited their use to proof of loss and the value of the articles of property only. Defendant objected on the grounds that answers to interrogatories were not admissible in evidence but were limited by Rule 33 to "discovery" only (R. 203 to 205).

Pursuant to the Court's ruling the other plaintiffs limited their testimony to employment with the defendant, the fire and cause thereof, the negligence, the housing furnished by defendant, and stood on their previous answers by way of interrogatories as proof of loss of property.

Leo Edward Krupa, a petroleum expert, was qualified as such, and testified (R. 292) that fuel used in heating equipment consisting of regular fuel oil, to which had been added 10% gasoline, would create a fuel with a flash point so low as to make it dangerous. Upon completion of this testimony the plaintiffs rested.

Defendant after renewing its motion to dismiss and it being denied, introduced two depositions, representing defendant's entire case, one for witness Douglas Blair and one for witness F. Murray Haskell; the latter testified on direct examination that he was Vice President of Haskell Plumbing and Heating, Inc. (R. 394), and that his company did not own the barracks building in which the men were housed and which was lost in the fire, and that it was not responsible for its upkeep and that he had hired an independent contrac-

tor for that purpose, namely Gaasland Construction Company (R. 398).

The Court in admitting into evidence the interrogatories and answers had informed the defendant that it was not precluded from calling witnesses to rebut plaintiff's claims as to loss of property (R. 208) but the defendant called the above named two witnesses only (R. 389, 394) who confined their testimony almost solely to the relationship of the defendant with the general contractor, Gaasland Construction Company, and to the fact that the barracks building belonged to Gaasland and not to defendant, and that the employee who had mixed the explosive fuel was employed by Gaasland and not by defendant.

On cross examination Haskell admitted that he had entered into a contract with the union on behalf of his company (Sup. R. 455, 456), covering the hiring of plaintiffs and that under the terms of that contract his company was responsible for furnishing living quarters (Sup. R. 463), that the plaintiffs had no choice as to where they lived but were compelled to live where assigned (Sup. R. 456, 457, 471), and that there was no other place for them to live (Sup. R. 471).

The defendant called no other witnesses limiting its evidence almost entirely to the method followed by the defendant in using facilities of Gaasland Construction Company, the prime contractor, such as buildings for housing employees, the feeding of employees, and care of the premises. It showed that defendant had a sub-contract to install heating and plumbing systems

for Gaasland Construction Company, who had a prime contract with the United States government at King Salmon.

It showed that the prime contractor, Gaasland, was required to pay defendant for its work on the heating and plumbing; it showed that defendant had an obligation to pay Gaasland for housing and feeding its employees; it showed that defendant and Gaasland worked out a private arrangement by which Gaasland would turn over to defendant a barracks building in which to house defendant's employees and provide a man (bull cook) to be caretaker of the premises, and in addition would provide meals for defendant's employees, and when the job was completed Gaasland would deduct from monies due defendant, for the plumbing and heating work, the monies owed Gaasland by defendant for Gaasland's housing and feeding of defendant's employees (R. 393).

This was strictly a private arrangement between defendant and Gaasland and there is no evidence in defendant's entire case to show that the plaintiffs were informed of this arrangement or that they agreed to look to Gaasland for this room and board. On the other hand the plaintiffs continued to rely on the contract with defendant and looked only to defendant for performance.

The defendant rested following the production of the testimony of Blair (R. 389) and Haskell (R. 394).

Following argument the Court indicated some doubt on the matter of measuring damages and setting a value on the lost property (R. 467). Plaintiffs then

called as their witness one Floyd Lundquist, an experienced insurance adjuster, to establish the depreciated value of the lost property and then rested their case. Following further argument on the merits and on defendant's motion to dismiss, the Court rendered its opinion, finding in favor of the plaintiffs (R. 421).

APPELLANT'S MISSTATEMENTS OF FACT.

Appellant's brief contains at least four misstatements of fact which are so conspicuous as to make it difficult to understand how the writer could have urged them upon the Court in the face of the testimony set out in the record.

The first of these is where appellant denies that it is a party to a certain contract entered into between the Plumbing and Heating Contractors and the Plumbers' Union. The statement that appellant is not a party to this contract is made several times in its brief, but particularly on page 6, third paragraph, where we find the following statement:

> "This was done (introduced into evidence) over the repeated objections of the defendant for the reason that the defendant was not a party to the contract, it being a contract between separate and different parties other than the defendant here." (Parenthesis ours.)

and again on page 32 of appellant's brief where appellant says:

> "Then defendant moved to strike the plaintiffs' Exhibit No. 1, which is a contract referred to and

introduced, over the objections of the defendant, which shows on its face to be a contract between the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the employers of the group named, for the reason *Haskell Plumbing and Heating Company, Inc., was not a party to the contract and is not binding on it.*" (Emphasis ours.)

Appellant makes the foregoing statements as against the contract itself, plaintiffs' Exhibit No. 1 (R. 426), which was signed for Haskell Plumbing and Heating Company, Inc., by F. Murray Haskell, and in the face of the testimony on cross examination of appellant's own witness, F. Murray Haskell, which appears in the record (Sup. R. 455 to 456) as follows:

"Q. Well, did you have, did Haskell Plumbing and Heating Company, have a written agreement with the plumbers' union?

A. Yes, we did.

* * * * * * *

Q. And was that the only written agreement that existed between any of these plaintiffs and Haskell Plumbing and Heating Company?

A. That is correct.

* * * * * * *

Q. Did the contract provide that these men would be furnished with housing or living facilities?

A. That is correct.

Q. And that they would be furnished room, or board, their meals?

A. That's right.

Q. And this contract also—well, the contract provided that Haskell Plumbing and Heating Company would furnish these facilities to these workmen, didn't it?

A. That is correct."

The second example of appellant's careless handling of the facts appears at pages 24 to 30 of the brief where appellant quotes testimony on direct and cross examination to show that appellees while aware of the dangerous practice of mixing gasoline and oil to burn in the heaters continued to live in the barracks, thus being negligent themselves. Appellant in its brief (P. 24) ascribes this testimony to appellee Weeks, when in fact it is actually the testimony of appellee Franz (R. 248), but the more serious misstatement is where appellant asserts in its brief (P. 25) that the testimony it is quoting is "practically every word of the testimony that in any way purports to show negligence on the part of anyone for the cause of the fire," and then having made this obviously inaccurate assertion appellant compounds the inaccuracy by stating on page 33:

"The testimony above quoted is the *sole* and *only testimony* of any negligence of anyone." (Emphasis ours.)

Contrary to these statements there actually is other very pertinent testimony in the record on the same subject; for instance, Franz, upon discovering that gasoline and fuel oil were being mixed, reported the fact to the superintendent for defendant, one Jules

Ferer, who assured Franz that this practice would be looked into by him and corrected (R. 250, 263). Other testimony on this same point which appellant chooses to ignore is that of the job steward, Mike Cullinane, who, learning from Franz of the use of gasoline with fuel oil also warned Jules Ferer, superintendent for appellant (R. 272) that the practice was dangerous and the superintendent admitted that it was not a safe practice and that this type of fuel would not be used anymore ((R. 273), and further Cullinane says that he relied on these assurances of the superintendent that he would discontinue the use of gasoline in the fuel oil because the superintendent was a very competent man (R. 278).

A further misstatement of fact occurs at page 36 of appellant's brief under "C" where appellant says:

> "C. The testimony above quoted shows that the plaintiffs well knew of the dangers in living in the Quonset hut, after seeing and knowing of the mixing of the oil and gasoline, and their action in continuing to live there and making no effort to correct the conditions known by them to be dangerous, made them guilty of contributory negligence, * * *"

We have previously shown that at least two of plaintiffs upon learning that gasoline was being mixed with fuel oil went to defendant's superintendent and informed him of the conditions, warned him of the danger, and elicited from him a promise to discontinue the practice, upon which assurance they continued to live in the building (R. 250, 263, 272, 273, 278).

Appellant has a duty to correctly state the facts even though they might be painful to him, but he again on page 38 says:

> "We think that the question of contributory negligence is elementary in this case, because there is no evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with the oil used in the Quonset hut where the plaintiffs were sleeping, * * *"

We have shown that the defendant company had a superintendent on the project who had direct supervision over plaintiffs and that two of the plaintiffs (Franz and Cullinane) informed this agent of defendant that a dangerous type of fuel was being used to heat the barracks (R. 250, 272). This would surely indicate beyond a doubt that defendant knew that gasoline was being mixed with fuel oil to heat the barracks. The superintendent's knowledge of this dangerous practice can be imputed to the defendant corporation, he being an agent of the same.

The foregoing are the most glaring examples of appellant's method of quoting selected testimony which supports its position, meanwhile denying the existence of other facts which are against it.

PRELIMINARY DISCUSSION OF APPELLANT'S POINTS.

Appellant has urged directly in its brief only four of the eight points contained in its original "Statement of Points" (R. 446). Nevertheless it has at random throughout the brief called attention to other alleged

errors and has argued some of them more or less extensively. Some of these alleged errors, although not specified as such in the brief, were set out in the original statement of points (R. 446) and others were not previously assigned.

Appellees have had some difficulty with the four points specifically urged in appellant's brief because they are not, in our opinion, clearly stated, and they appear to be argumentative to a degree that somewhat obscures the actual error claimed. It is thought that the points ought to be restated in less involved terms, in order to make a more logical response, however, we have endeavored in this brief to grasp the significant features of each error alleged. Other errors claimed by appellant in the brief without specification as "Points" will also be discussed but only because appellant has argued them to a considerable extent. One of the undesignated errors in the brief, namely, to use appellant's phrase—"assumption of risk and contributory negligence"—is urged by appellant through four pages of its brief from 35 to 38, and this extensive argument is made by appellant when neither contributory negligence nor assumption of risk were pleaded in the defendant's answer or raised during the trial.

FIRST ARGUMENT.

(Points One and Two.)

Appellant has grouped its points one and two for argument, as it should have, because, from our point of view, points one and two contain the same alleged

error although couched in somewhat different language. We have therefore, for the purposes of developing an orderly presentation, restated appellant's points one and two as we understand them, leaving out all extraneous matter as follows:

> "That the Court erred in admitting into evidence the interrogatories propounded to plaintiffs by the defendant and the answers of the plaintiffs as proof of the property damage sustained by plaintiffs."

The Court acted within its discretion and in accordance with FRCP 33 and 26(d)(2) when it admitted into evidence the defendant's interrogatories and plaintiffs' answers as a portion of plaintiffs' proof of loss of property and the value of the same.

Appellant has relied on Barron and Holtzoff Section 778 in support of its contention that the interrogatories which it served upon plaintiffs and the answers of plaintiffs were for *discovery purposes only* and were not admissible into evidence (emphasis ours).

The reasoning by which appellant has determined that Section 778 forbids the introduction into evidence of interrogatories and answers is not clear to us for the reason that the language of Section 778 is quite opposite to the meaning found therein by appellant. Section 778 reads as follows:

> "778. Use of Answers to Interrogatories.
>
> Answers to interrogatories are not considered evidence unless offered as such at the trial. As originally adopted, Rule 33 contained no provi-

> sions as to the use of answers to the interrogatories at the trial. It was held that such answers could be introduced in evidence by the interrogating party as admissions against interest on the part of the answering party, or for impeachment, but that a party could not generally introduce his own answers to his opponent's interrogatories, since they would be self-serving statements. * * *''

This language cannot easily be misunderstood. Appellant has inversely concluded that the only part of the foregoing section that has any bearing on the present subject is where the section refers to Rule 33 as originally adopted. Its emphasis of this portion of the paragraph (Brief P. 16), by use of italics, is devoted entirely to that part of Section 778 which describes the rule before it was amended, and appellant's subsequent argument, including the citation of cases, is confined to the rule as originally adopted and avoids the rule as amended. It is difficult for us to understand how appellant could so read Section 778 as to conclude that it confines the interrogatories and answers propounded under Rule 33 to "discovery purposes only" and prohibits their use as evidence. If appellant has misread the first paragraph of Section 778, it is even more difficult for us to understand how it could have misread the second paragraph which is perfectly clear and cannot be misunderstood:

> "Rule 33 was amended, effective March 19, 1948, to provide that answers to interrogatories may be used to the same extent as provided in Rule 26(d) for the use of a deposition of a party."

In the face of this authority appellant has attempted to convince this Court that Section 778 of Barron and Holtzoff defines Rule 33 as to preclude the use of interrogatories and answers as evidence and limits its function to discovery only.

If appellant really examined Rule 26(d)(2) it found the following language:

> "The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose."

The several cases cited by appellant to support its contention that interrogatories and answers are not admissible in evidence are all cases which were decided between 1939 and 1943 and of course do not reflect the rule as amended. These cases were decided as follows:

Bailey v. New England Mutual Life Insurance Company of Boston, 1 F.R.D. 424, 1940;

United States v. General Motors Corp., et al., 2 F.R.D. 528, 1942;

Coca Cola Company v. Dixi Cola Laboratories, Inc., 30 F.Supp. 275, 1939.

The case of *Smith v. United States* cited by appellant was decided in 1951 and does reflect the amended rule, but this case is not a companion case with the three cases set forth above and in fact holds that interrogatories and answers *are* admissible under Rule 33 as amended in 1948, and then distinguishes the case

by showing that if such interrogatories or answers are objectionable because there exists some rule of evidence which might preclude them they may not be admissible. The answers in the Smith case were answers made by the defendant which the Court held to be inadmissible because they were *self-serving* and *not* because answers to interrogatories are inadmissible under Rule 33, as appellant contends (emphasis ours).

Appellant has also labeled plaintiffs' answers to the interrogatories as self-serving. It may be that an answer of a witness which serves to support his claim is self-serving but then all testimony in support of a litigant's position is self-serving in that sense. The objectionable features of what we ordinarily call inadmissible self-serving statements are usually objectionable for some other reason. Jones on Evidence, Fourth Edition, Section 235, discusses this type of evidence and points out that self-serving statements ordinarily do not have the sanction of an oath and then continues:

> "The declarations of a party which are favorable to his interest are not admissible in his behalf. Manifestly it would be unsafe if, without restriction, parties to litigation were allowed to support their claims by proving their own statements made out of Court. Such a practice would be open not only to all the objections which exist against the admission of hearsay in general, but would also open the door to fraud and to the fabrication of testimony.
>
> * * * * * * *
>
> It has been held, too, that there is no special rule excluding self-serving declarations merely because

> they are of that character if they are not otherwise inadmissible as hearsay or for some other reason."

The answers made by appellees to the interrogatories were required to be made upon oath under FRCP 33 and had appellees failed to answer, certain penalties could have been imposed, and had they failed to answer truthfully other and more severe penalties could have been imposed. The answers to the interrogatories were served on appellant on April 2, 1954, nine months before trial. Appellant had ample opportunity to verify the truth of the answers before trial, however, appellant failed to avail himself of this opportunity and at the trial of the case offered no evidence in rebuttal as to the existence of the property and in fact introduced no evidence at all as to the value of property destroyed even though this property was the sole basis of appellees' claim for damage.

Appellant's contention that FRCP 33 is for discovery only and does not contemplate the use of interrogatories or answers as evidence, a contention which it urged throughout the trial and now urges in this brief, is not supported by any case since Rule 33 was amended in 1948, and the rule itself is clear and indubitably allows the use of interrogatories and answers to the same extent as provided in FRCP 26(d)(2) for the use of a deposition of a party.

SECOND ARGUMENT.

(Points Three and Four.)

Appellant has joined points three and four together for its second argument and has divided point three into two parts, (a) and (b).

With reference to appellant's sub-point (a) appellees mention that there is no part of appellant's brief that treats the subject of "Erroneous conclusion as to proof of value" or that the judgment was "based upon the wrong measure of damages" and that the only reference in appellant's brief to either subject is in the statement of the point itself.

It would seem therefore that no response to (a) of point three would be required of appellees, nevertheless we point out that each of the appellees gave evidence as to the value of his property and the court based its judgment on that value after deducting 30% therefrom for depreciation upon hearing an insurance adjuster (R. 414) testify that in settling insurance claims on the loss of property, similar to the property lost by appellees, he would deduct from the purchase price value a figure somewhere between 20% and 33%. The appellant at no time during the trial called a witness or provided evidence as to proof of value or presented to the Court any suggestion or formula as to how to measure damages. The Court, based on the insurance adjuster's testimony, made a flat deduction of 30% from the values claimed by appellees.

Appellant in sub-point (b) under point three says:

> "That no cause of action in favor of these two particular plaintiffs, or any of the plaintiffs, was actually proven."

Appellees consider this equivalent to a challenge as to the sufficiency of the evidence to support the judgment in favor of the appellees.

Appellee Callaway personally, and Hobbs by deposition, testified as to all phases of appellee's case, including value of property and the loss of the same and each such appellee was cross examined in great detail by counsel on all phases of their testimony on direct examination, including description, price, place of purchase, and age of articles destroyed.

Appellees Weeks, Judson, Franz, Cullinane, and Mulcahy all testified personally as to all facts concerning their employment, their housing, the fire and the cause thereof, the Court admitted their answers to the interrogatories into evidence only as to proof of loss of property and the value of the same. Cross examination of these witness covered all phases of their direct examination.

Appellee Holbrook, unable to come to the trial from his home in Kentucky, proved his case by the admission into evidence of the interrogatories and answers as a deposition under FRCP 33 and 26(d)(2).

Appellees by that evidence have fully supported their claim for damages. Each one proved that he was an employee of the appellant and was an occupant of the housing unit furnished by the appellant pursuant to the written union-contractor agreement (R. 438, par. 6(a)); each proved directly or indirectly that the fire resulted from defendant's negligence; each appellee proved that he lost property in the amount found by the Court. The appellees, and each

of them, supported their causes of action for damages by a preponderance of the evidence.

FURTHER ARGUMENT.

(Points Three and Four.)

While appellant states that it will argue points three and four together, it actually proceeds to ignore both points and commences its argument by quoting several pages of testimony commencing with page 24 of the brief pertaining to the use of oil and gasoline in the stoves. Appellant emphasizes this testimony by quoting part of it in italics apparently for the purpose of showing that the appellees did not know for whom the bull cook, who was mixing gasoline and oil, worked, and that appellees knew that use in a heating stove of fuel oil, to which had been added a quantity of gasoline, was dangerous and that regardless of this knowledge appellees continued to live in the barracks. Appellees find it difficult to understand how the quoted testimony is relevant to either point three, as subdivided (a and b), or point four. Appellant's original statement of points (R. 446) has assigned as error eight separate points. The sixth point refers to assumption of risk but appellant has not re-designated that point in its brief, nor has it grouped it with any other point for argument.

Appellant in quoting testimony, pages 24 to 30 of its brief, attempts to emphasize two propositions. First, that the bull cook, who was negligent, was not known by the witness to be an employee of appellant; and

second, that the appellees assumed the risk by continuing to live in the barracks.

Appellant does not mention that each appellee established that appellant furnished the living quarters and assigned appellees to the barracks building for that purpose and that appellant had a contractual obligation to furnish such quarters (R. 438).

Appellant also has carefully avoided in setting forth the testimony commencing at page 24 of the brief the further testimony of the appellee Franz to the effect that upon accidentally discovering that regular fuel oil was being mixed with gasoline, not only informed his job steward, but also personally informed one Jules Ferer, the project superintendent for Haskell Plumbing and Heating Company, that he had observed the practice and that he considered it dangerous. This testimony conspicuously omitted by appellant appears in the transcript of record at page 250, line 7, which we quote:

"Q. Did you call it to any one else's attention?

A. Yes, I called it to the superintendent of Haskell Plumbing and Heating's attention.

Q. Who was he?

A. Jules Ferer.

Q. Now, did you point out anything to him about that practice?

A. Well, I told him I couldn't recommend that kind of practice.

Q. Now, don't say what he said, but so far as you know, did they change their procedure?

A. I don't believe so; I don't know.

Q. Now, did you tell any one else besides Jules Ferer?

A. Yes, I told the shop steward.

Q. And who was the shop steward?

A. Michael Cullinane.

Q. Michael Cullinane. You know you told him? And do you recall telling anybody else?

A. Well, it caused quite a discussion, and I guess I told everybody.

Q. You recall talking it over with your fellow employees; is that correct?

A. Yes."

and again at page 262 there was further testimony which we quote:

"Q. Mr. Franz, in your conversation with the bull cook, after you called his attention, as you said, to the fact of this dangerous practice, did he satisfy you that it was not?

A. No.

Q. Did he make any statement to you that it was not dangerous?

A. They was working on a theory, to my way of understanding it, to see whether it would work.

Q. Who was working that out?

A. I don't know who he worked for. If he was working for Haskell or Gaasland. I don't know who he was working for. I don't know.

Q. Did you have enough conversation with him to ascertain whether he was doing it on his own volition or under ——?

A. No. It was my understanding he had been told to do that.

Q. And you gleaned that from your conversation?

A. Yes.

Q. And when you talked to the superintendent, did the superintendent satisfy your fears about it?

A. He said he would see what he could do about it.

Q. And on that assurance you went back and stayed in the barracks?

A. That's right."

Appellant has also failed to mention in its brief the testimony of Mike Cullinane, the job steward, on this subject, which we quote (R. 271, 272):

"Q. Now you heard Mr. Franz testify yesterday that he mentioned to you that the bull cook was mixing gasoline and diesel oil and putting it into barrels to be used as fuel for the stoves. Did you hear him so testify?

A. Yes, I did.

Q. And did he mention that fact to you?

A. Yes, he did.

Q. Did you mention that to anyone else?

A. Yes, as job steward I mentioned it to Mr. Jules Ferer who was the superintendent for Haskell Plumbing and Heating, to see if he would do anything about it, inasmuch as we didn't think it was a safe practice; and he said that he would take care of it.

Q. I think that perhaps you ought not to say what he said. It is hearsay; but were you satisfied that something would be done about it?

A. Yes, I was satisfied with the answers that Mr. Ferer give us on that, inasmuch as we never had any occasion to doubt his word; he had been very pleasant and easy to get along with, as the superintendent on the job and all.

* * * * * * *

Q. When you told him that the—that you had heard from Mr. Franz that the bull cook was mixing gasoline and diesel oil to create a fuel for the

stoves—when you told him that, what did he say to you?

A. Well, he said that he knew about the incident, that Mr. Franz had mentioned it to him, and perhaps it wasn't safe and he would take measures to have it taken care of so that they wouldn't do that any more."

And again on cross examination (R. 278) the appellee Cullinane testifies as follows:

"Q. Now, when you mentioned this bull cook having been seen mixing gasoline and the oil, did you mention that to Jules somebody, did you say?

A. I didn't mention the bull cook and the oil to Mr. Jules Ferer as having seen it. I mentioned that Mr. Franz had seen this bull cook mixing this oil and gasoline, and reported the incident to Jules to have him do something about it.

Q. Now he was in what capacity there?

A. Why he was the head man—the superintendent—for Haskell Plumbing and Heating.

Q. Well did he have anything to do with anything but the plumbing?

A. I wouldn't know. That's the capacity we were in—plumbers and fitters, and what else, I do not know.

Q. Well he was the superintendent on the works, was he not?

A. I don't know. He was the superintendent on the plumbing and heating.

Q. Well, he was general superintendent over everything there, was he not?

A. No, he wasn't.

Q. Who was the general superintendent, then?

A. As far as I know, the general superintendent of Gaasland Construction Company was a gentleman that died a year or so after that.

Q. Do you remember his name?

A. I recall his first name and I believe it was "Pete". And may have been Jensen, but I am not sure of that.

Q. All right. Now was—you didn't mention this to Jensen, did you?

A. We don't have anything to do with those people I mean we are—

Q. But did you?

A. No.

Q. Un-huh. Now, about what date was it that you mentioned this to this fellow 'Jules'?

A. It was right after Mr. Franz reported it, which was around the first of October, as I recall.

Q. Did you ever mention it to him any more after that?

A. No, this Mr. Ferer was a very competent man, to say the least, and when he'd say he'd take care of something, why that was all there was to it."

Appellant's witness, F. Murray Haskell, in reply to the following questions (Sup. R. 467) gave the following answers:

"Q. Was your superintendent the man who is directly over the plaintiffs in this action?

A. That's right.

Q. And he would see the men there in the barracks probably every day?

A. He lived in the quarters right next to the mess hall also. How many times he was at the barracks that burnt, I have no knowledge."

Appellees were three hundred miles from Anchorage, performing seasonal work in a construction camp and were compelled to live under such conditions and circumstances and at such a place as the appellant designated (Sup. R. 457). Appellant infers that if they didn't like the kind of fuel being used to heat the barracks they should not have continued to live there. The fact of the matter is they were required to live where they were assigned and had no choice in the matter (Sup. R. 457) and Haskell himself admits (Sup. R. 471) that there was no other place for them to live.

FURTHER ARGUMENT ON POINT FOUR.

Haskell Plumbing and Heating Company could not delegate its contractual obligation to furnish living quarters to plaintiffs by making arrangements with another company to maintain the barracks.

Appellant's point number four presumably is directed at some error which appellant believes the Court committed, however, it is difficult to pin point the error claimed. A careful reading of the point seems to indicate that inasmuch as the defendant claims it was not responsible for furnishing living quarters to the plaintiffs, and that any act of negligence which caused the fire was the negligence of a bull cook who was employed by Gaasland Construction Company that defendant was therefore not liable for loss of plaintiffs' property.

This position of non-liability, taken by the appellant, is in our opinion untenable. It assumes that one party to a contract who is obligated by such contract

to perform a duty to the other party may escape responsibility for failure in performance by delegating the duty to a third party without the knowledge or consent of the party to whom the duty is owed.

An examination of the interrogatories filed by each plaintiff, and in the personal testimony of each, will show that the plaintiffs believed *defendant was furnishing* the room and board and knew nothing about defendant's arrangement with Gaasland.

It is perfectly clear that under the terms of the contract (R. 438) paragraph 6 (a) that the defendant had a duty to furnish living quarters to plaintiffs. Appellant contended throughout the trial and presently in its brief that defendant was not a party to this contract and therefore was not bound by it. This contention, however, is without merit because appellant may not avoid the plain obligations of the contract (R. 426) or the consequences of the testimony of its own witness, F. Murray Haskell, principal officer for the defendant, Haskell Plumbing and Heating Company, who was questioned and answered as follows (Sup. R. 463):

> "Q. Under the terms of your contract with the representative union at Anchorage in connection with the hiring of the plaintiffs in this case, at King Salmon, you were aware and conscious of the obligation of the Haskell Plumbing and Heating Company to furnish these men, your employees, with housing facilities and with their meals during the time they were performing their contract with your company?
>
> A. That is correct.

Q. And you folks, meaning the Haskell Plumbing and Heating Company, undertook to do that?
A. That's right."

Appellant in support of this contention has relied chiefly on the fact that the barracks building was not owned by defendant but by Gaasland Construction Company and that the person who had mixed gasoline with fuel oil was an employee of Gaasland Construction Company. It does not seem to us that defendant could escape liability for the loss of the plaintiffs' property because he had some private arrangement with Gaasland Company to use Gaasland's building to house defendant's employees, or that an employee of Gaasland's, rather than an employee of defendant, filled the fuel barrels and was guilty of the specific act of negligence that occasioned the explosion and fire. Defendant had a duty to furnish satisfactory housing for the plaintiffs, and by satisfactory housing it surely meant a duty to furnish safe housing, and if in order to discharge this duty, defendant provided a building owned by some other contractor, and arranged for an employee of the other contractor to fill the fuel barrels, it could not take the position that it was not liable for the consequences of the negligent act of this other employee and insist that plaintiffs should have filed suit against the other company. Appellant's brief in the concluding paragraph states "Surely the plaintiffs have sued the wrong corporation as defendant."

The trial court in its opinion (R. 423) said:

"Then we come to the question of who is responsible for that damage. Other things being

equal there would be no argument, of course, but what the employer who agreed to furnish the quarters would be so liable. The defendant claims in his deposition that it is not liable because it, the corporation employed—not employed but made an arrangement with the general contractors—the Gaasland Company—to take care of all of this board and room which they are obligated to furnish. It seems that they had a cost-plus contract, and that all of their costs were to be paid by Gaasland, and therefore Gaasland, who was maintaining a camp, agreed to provide these accommodations. Now, it is argued that that entirely relieves the employer from this responsibility —but I fully concur with the position taken by counsel for the plaintiffs that under the law such responsibility cannot be so delegated; that this is the type of liability which an employer or anyone else cannot relieve himself by simply passing it on to someone else. And in fact, if you please, that the superintendent of Haskell Plumbing Company, Mr. Ferer,—if it be true that he did report it to Gaasland, it makes the situation worse and not better, because again they are trying to escape responsibility, and to use the common phrase 'pass the buck', but that is not permissible under the law. *I agree with counsel that no suit could be maintained against Gaasland Construction Company for these damages.* The doctrine that such responsibility cannot be so delegated is set forth in a great many authorities, most of which have been cited by counsel, together with the case which I mentioned. The liability springs from the wrong, and that is the fundamental question here. The wrong in this case may not be one of commission—it may be said that Has-

kell Company and its employees did not put this gas in the oil—but it is one of omission. It was the duty of the Haskell Company to see that these premises were safe, and when informed of a dangerous situation to see that that situation was immediately corrected, which obviously was not done. Therefore, I find that the defendant is liable for this damage. Whether they may have recourse against the Gaasland Construction Company is not for me to determine, but possibly they have." (Emphasis ours.)

We think the Court came to the correct conclusion and the authorities support that conclusion squarely. Williston on Contracts, Rev. Ed., Vol. Two, Section 411 reads:

"The duties under a contract are not assignable inter vivos in a true sense under any circumstances; that is, one who owes money or is bound to any performance whatever, cannot by any act of his own, or by any act in agreement with any other person, except his creditor, divest himself of the duty and substitute the duty of another. * * * One who is subject to a duty though he cannot escape his obligation may delegate performance of it provided the duty does not require personal performance. In the absence of express agreement to the contrary there will be no such requirement if the duty is of such character that performance by an agent will be substantially the same thing as performance by the obligor himself. The performance in such a case is indeed in legal contemplation rendered by the original obligor, who is still the party liable if the performance is in any respect incorrect."

35 Am. Jur. 533 (Master and Servant) states the general rule as follows:

> "If the contract of employment contemplates provision by the employer for food, clothing, and shelter for the employee, any neglect of obligations thus assumed will render the employer liable for injuries sustained by the employer, or if the employer undertakes to provide for the employee he will be liable if he furnishes an unsuitable lodging place."

The employer owes a duty to his employees to provide for them a safe place to work and if circumstances require that the employees live upon the employer's premises while performing that work then the duty extends to providing a safe place for the employee to live, particularly when the compensation provided in the contract of employment includes board and room. This duty, including the providing of safe instrumentalities, equipment and tools for the protection of the employees, also extends to such instrumentalities as heating stoves for the employees' quarters. The rule requiring the maintenance and repair of instrumentalities at the location of the employment is stated in 35 Am. Jur. 570, and requires not only the maintenance and repair of instrumentalities but states that the employer is bound to maintain these instrumentalities in a safe condition.

This duty of the employer to maintain a safe place for his employees "is affirmative and continuing, and it cannot be delegated to another so as to relieve the employer of liability in case of non-performance." 35 Am. Jur. 612.

We find the following rule which seems to compare rather closely with the subject case:

> "If the contract of employment contemplates that the employee shall sleep upon the premises of the employer, the latter is bound to exercise care to see that the sleeping quarters are safe, according to the standard of care to which the employer is obliged to conform." 35 Am. Jur. 599.

The testimony of both defendant's witnesses, Blair and Haskell, will show that the arrangement under which Gaasland Construction Company furnished a barracks building to defendant, in which to house defendant's employees and to provide caretaker service for said building, was one of convenience and accommodation for both the defendant and the general contractor, Gaasland. Blair put the whole situation in one answer (R. 393) when he said:

> "Q. What was the arrangement?
>
> A. As I recall, one of the provisions of the agreement with Haskell Plumbing & Heating Company was that they should be compensated for all of their costs in connection with their subcontract, and that they should receive a certain additional amount over and above the costs. There was, therefore, no object in Gaasland Company's billing subsistence and quarters to Haskell only to have Haskell bill them back to Gaasland Company. That, to the best of my recollection, explains the absence of any agreement as to a specific amount to be charged.
>
> Q. Gaasland just picked up the check as it came along?
>
> A. That is correct."

Thus we find that Gaasland as prime contractor and Haskell as subcontractor had a "cost plus a fixed fee contract" under the terms of which Gaasland was to pay all Haskell's costs. Part of Haskell's costs would have been housing and feeding of its employees. In order to avoid duplication or double bookkeeping Gaasland simply assumed the cost directly. This arrangement did not place Gaasland in the position of independent contractor, and nowhere in appellant's brief does it contend that Gaasland was an independent contractor. We are of the opinion, in view of the authorities cited, that the duty of the defendant to furnish safe quarters to the plaintiffs, was of an affirmative and continuing nature and could not be delegated to another, even an independent contractor, to relieve the defendant of liability.

We find this rule especially applicable in this case:

> "Likewise, one who, by a specific agreement, undertakes to do some particular thing, or to do it in a certain manner, cannot by employing an independent contractor, avoid responsibility for an injury resulting from the nonperformance of any duty or duties which under the express terms of the agreement or by implication of law, are assumed by the undertaker." 27 Am. Jur. 526.

The above rule was stated in the case of Atlanta & F. R. Co. v. Kimberly, 13 SE 277, 27 Am. St. Rep. 231.

ARGUMENT.

(Contributory Negligence—Assumption of Risk.)

Appellant contends that because appellees continued to live in the barracks after learning that an unsafe fuel was being used in the stove were negligent themselves and assumed any risk involved. Appellant says at page 35 of its brief:

> "B. The plaintiffs testified of the knowledge of the danger of mixing gasoline with stove oil; testified of reporting this matter to at least a part of the other plaintiffs herein and admitted going on living in the premises knowing explicitly the danger involved and, therefore, assumed the risk."

and again on page 36, appellant says:

> "C. The testimony above quoted shows that the plaintiffs well knew of the dangers in living in the Quonset hut, after seeing and knowing of the mixing of the oil and gasoline, and their action in *continuing to live there and making no effort to correct the conditions known by them to be dangerous,* made them guilty of contributory negligence, * * *" (emphasis ours).

and again on page 38 appellant says:

> "We think that the question of contributory negligence is elementary in this case, because there is no evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with the oil used in the Quonset hut where the plaintiffs were sleeping, * * *"

It is difficult for us to understand how appellant can seriously suggest the foregoing propositions, when

it is clear in the record that at least two of the plaintiffs, following a discussion amongst all the plaintiffs (R. 250), went to defendant's superintendent and called to his attention the use of gasoline treated fuel oil (R. 250, 271, 272) and were assured by the superintendent that the use of such fuel oil would be discontinued (R. 263, 273) and based on this assurance they continued to live in the barracks (R. 263, 272, 279).

Appellant says plaintiffs' action in continuing to live there and making *no effort to correct the condition* known to them to be dangerous, made them guilty of contributory negligence. Appellant obviously did not read the recorded testimony on the subject in full. Appellant says there is nothing in the evidence to indicate that the defendant knew or had any reason to know or believe that gasoline was being mixed with oil. Appellant's witness, F. Murray Haskell, testifying for the defendant, said that he had a superintendent on the project who was his agent (Sup. R. 264); he also said that his superintendent was directly over the plaintiffs (Sup. R. 467). It would appear to us in view of the fact that both appellees Franz and Cullinane, having informed defendant's superintendent of the gasoline treated oil and Haskell's admission that he had a superintendent on the project and that the superintendent was his agent, that appellant's claim that it knew nothing about the matter is unworthy of belief.

These facts and the following authority should successfully dispose of this contention in favor of appellees.

> "According to a well-settled general rule, the 'assumption of risk' or responsibility which is based upon the employee's knowledge that a tool, instrument, appliance, piece of machinery, or place of work is defective or dangerous is suspended by the employer's promise to repair, made in response to the employee's complaint, so that, if the employee has been induced by the promise to continue at work, he may recover for an injury which he has sustained by reason of the defect within a reasonable time after the making of the promise. * * *" 35 Am. Jur. 743, *Seaboard Air Line R. Co. v. Horton,* 239 U.S. 595.

It is our opinion that "contributory negligence" and "assumption of risk" are affirmative defenses which must be pleaded if a party expects to rely on such a defense. Appellant not only did not raise the defense in its pleadings, but did not raise it during the trial and has not argued it in the brief under the color of a designated point, and has only discussed it in its brief, to use appellant's words "solely as a precautionary measure in case the court should overrule appellant's other arguments."

Appellees were not guilty of contributory negligence nor did they assume any risk and appellant cannot raise such an issue on this appeal.

FURTHER ARGUMENT.

(Negligence of Defendant.)

Defendant was negligent in permitting the barracks to be heated by using gasoline treated fuel oil.

We have previously shown that defendant had an affirmative and continuing duty to safeguard plaintiffs and may not escape liability by delegating that duty to another. We think that the failure of defendant to discontinue the use of gasoline treated fuel oil when the danger incident to its use was called specifically to its attention was negligence and appellees' loss resulted from that negligence.

CONCLUSION.

We conclude by stating that the appellees have shown that the trial Court, in admitting into evidence the interrogatories and answers, did so in accordance with provisions of FRCP 33 and 26 (d) (2); that the defendant, Haskell Plumbing and Heating Company, could not transfer liability for the loss of plaintiffs' property to a third party by making an arrangement with that third party to perform a duty which defendant had obligated itself to perform under the contract of employment; that the defendant was negligent in knowingly permitting to be used a dangerous fuel for heating the building in which plaintiffs were housed; that plaintiffs did not assume the risk of living in the building furnished by defendant under the terms of the contract, and that they were not guilty of contributory negligence; that the Court placed a

fair value on the articles of personal property lost by the plaintiffs in the fire; and for the foregoing reasons the judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
January 5, 1956.

Respectfully submitted,
HAROLD J. BUTCHER,
Attorney for Appellees.